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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DIANE HUFSTEDLER, Plaintiff and Appellant, v. VAUGHN GIVEN, Defendant and Respondent.	G029381 (Super. Ct. No. D304594) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Walter D. Posey, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed in part.

Smith, Chapman & Campbell, Michael J. Ward and Tara L. Martin for Plaintiff and Appellant.

R. Jeffrey Isles for Defendant and Respondent.

* * *

Plaintiff Diane Hufstedler appeals from a postjudgment order ruling on defendant Vaughn Given's motion to divide an asset not adjudicated in the parties' dissolution of marriage. She argues the court erred in ordering an offset of defendant's proceeds in the family residence against unpaid child support, assessing interest on those proceeds, refusing to allow her to examine defendant about the sale of a community business, and failing to award attorney fees based on defendant's breach of fiduciary duty. We agree attorney fees should have been ordered, reverse that portion of the order, and affirm the remainder of the order.

FACTS

The parties dissolved their 10-year marriage in 1991. They have one child, born in 1985. During the pendency of the dissolution action, defendant was ordered to pay both spousal and child support. The judgment also required defendant to pay support, $700 per month each for spousal and child support. The family residence was confirmed as plaintiff's separate property, subject to a $50,000 community interest therein. The order awarded the chiropractic practice jointly to the parties, subject to the equalizing payment on the residence. The court reserved jurisdiction over distribution of the community property until resolution of a pending lawsuit filed by defendant's parents. Jurisdiction was also reserved over the award of attorney fees defendant was to pay to plaintiff's attorney.

The action filed by defendant's parents was resolved. In 1992, defendant filed bankruptcy. In one of the schedules he claimed $55,000 as "credit of comm. property . . . is offset by unpaid support." Subsequently, defendant sold the chiropractic practice without notice to plaintiff and failed to pay any of the proceeds to her.

In 2000, defendant filed a motion to have the residence sold and the proceeds divided equally. Plaintiff raised several defenses, including the prior

reservation of jurisdiction over the chiropractic business subject to the equalization payment on the residence, defendant's unauthorized sale of the practice, defendant's bankruptcy claim he had no interest in the residence, and his subsequent discharge. Plaintiff also filed an order to show cause to modify child support and for attorney fees. The motion and the OSC were calendared for hearing on the same day.

The court found defendant owed plaintiff almost $25,000 in child support arrearages. It credited defendant's $25,000 community property interest in the residence as an offset against the unpaid child support. The court refused to decide spousal support arrearages, finding that issue was not before the court, but without prejudice to any further orders. It also ordered defendant to pay plaintiff $7,500 for her interest in the chiropractic business defendant had sold. Finally, the court found both parties acted in good faith and should each bear their own attorney fees.

DISCUSSION

Award of Credit for Defendant's Interest in Residence

Plaintiff contends the court erroneously awarded defendant a credit for his community property interest in the residence. She maintains defendant had already received a credit in his bankruptcy action when he offset it against "unpaid support." We are not persuaded.

Initially we note that defendant's motion seems somewhat disingenuous; his request that the residence be sold and the proceeds be divided equally does not completely square with his bankruptcy petition where he claimed an offset against his share of community property and claimed "0.00" as a credit from the dissolution. However, the record does not show defendant actually received a credit; we find no reduction in the amount of past due support based on the bankruptcy. Moreover, other than the offset against an essentially equal amount of child support arrearages due as of

September 1992, the trial court made no ruling on spousal or remaining child support owed. In fact, the court refused to determine spousal support arrearages, and the order was specifically "without prejudice to spousal and child support orders."

Plaintiff insists that the credit had to offset unpaid spousal support, but fails to convince us why. The bankruptcy petition simply refers to "support," and plaintiff admits it does not specify what type of support. Plaintiff argues she decided the offset would be against spousal support and acted accordingly by attempting to collect child support and that defendant never objected. But this alone does not perforce compel the court to adopt her interpretation. Further, plaintiff cites no case requiring the court to offset against spousal support as opposed to child support. While we do not disagree that the issue of unpaid spousal support was before the court in the form of a claim for offset (Code Civ. Proc., § 431.70), we do not agree that the court had to offset according to plaintiff's preference.

Plaintiff argues the court, sitting in equity, should have resolved all the disputes to "avoid a multiplicity of suits" by allowing or requiring testimony on all relevant issues, including defendant's intent when making the claims in bankruptcy. This might have been preferable but was not mandated.

Plaintiff's one-sentence conclusion that defendant now has a claim against her for more than $10,000 in overpaid child support is not supported by the required citation to the record or reasoned argument. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) Consequently, we do not decide this claim.

We are not persuaded the court lacks jurisdiction to adjudicate the issue based on defendant's delay. The court initially reserved jurisdiction over division of the chiropractic practice and the community interest in the residence. The court did not lose jurisdiction merely because defendant waited to file his motion.

Likewise, we reject plaintiff's laches defense based on defendant's nine-year delay in bringing his motion. As we fully discussed in *In re Marriage of Cordero* (2002) 95 Cal.App.4th 653, we do not believe a laches defense is available here. Historically, "*laches*, as distinct from other equitable defenses based on the affirmative conduct of the payee spouse, was *not* a defense to the collection of a support judgment for arrearages within the [10-year] statutory period before a judgment had to be renewed. [Citations.]" (*Id.* at p. 661.) Moreover, even now when a support judgment does not have to be renewed, "there is nothing in the text of the Family Code that allows courts to consider a laches defense." (*Id.* at p. 665.)

That said, as we noted in *Cordero,* equitable estoppel and waiver remain viable defenses to a support collection attempt. (*In re Marriage of Cordero, supra,* 95 Cal.App.4th at p. 662, fn. 7; see *Kaminski v. Kaminski* (1970) 8 Cal.App.3d 563, 565-566, disapproved on another ground in *In re Marriage of Comer* (1996) 14 Cal.4th 504, 529 [wife's statement to former husband to "just stay out of my life and leave me alone" estopped her from enforcing out of state judgment]; *Graham v. Graham* (1959) 174 Cal.App.2d 678, 683-684 [parties' agreement to reduce support held to be waiver of right to collect sums in excess of reduced amount].) Plaintiff has the right to pursue these defenses in any further attempts to collect unpaid spousal support.

Interest

Plaintiff asserts the court improperly charged her with interest on the $25,000 due to defendant from the family residence. We disagree.

There is no assessment of interest in the order. Rather, it simply offsets the $25,000 due to defendant against $25,000 due in child support arrearages. The language about which plaintiff complains is quoted from comments the court made at the hearing on the motion. Since this was not made a part of the order, it has no effect. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.)

Evidence as to Sale of Chiropractic Practice

Plaintiff's contention the court erred by refusing to allow her to examine defendant about sale of the chiropractic practice is without merit. There is nothing in the record evidencing such a refusal. It may have occurred in the chambers conference to which plaintiff alludes, but without a record of that proceeding, we must assume the court's ruling was proper. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Attorney Fees

Plaintiff argues the court erred by failing to award her attorney fees despite its finding that defendant's sale of the chiropractic practice without her consent was a breach of fiduciary duty. We agree.

When a spouse breaches his fiduciary duty, Family Code section 1101, subdivision (g) mandates an award of attorney fees and costs. (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 43.) Here, because the court found defendant breached his fiduciary duty, it was required to award plaintiff her attorney fees.

Defendant maintains the court "made clear . . . that the equities" dictated the parties pay their own fees. Further, he argues, the court offset fees it would have awarded defendant against fees it would have awarded plaintiff. The record does not support this interpretation. Although the minute order states each party acted in good faith, nothing in the formal order so states, nor is there any finding plaintiff breached her fiduciary duty. Further, the minute order was superseded by the court-ordered formal order. (*In re Marriage of Drake, supra,* 53 Cal.App.4th at p. 1170.)

Finally, plaintiff's failure to request fees in her response or the lack of supporting evidence do not vitiate the court's duty to award fees. (See *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 993.)

DISPOSITION

The portion of the order directing the parties to bear their own attorney fees is reversed. On remand, the trial court should determine the attorney fees and costs to be awarded plaintiff under Family Code section 1101, subdivision (g). The remainder of the order is affirmed. The parties shall bear their own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.